

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL E. LOVELL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 13-cv-05757 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos.).

After considering and reviewing the record, the Court finds that the ALJ erred when reviewing the medical evidence from examining doctors, Dr. Hill and Dr. Lemberg. Although the ALJ found that plaintiff exerted poor effort in certain tests performed by

1 Dr. Hill, the record demonstrates that plaintiff's variable effort was a factor in Dr. Hill's
2 ultimate opinion. Also, although the ALJ stated that the longitudinal record does not
3 support the opinion of Dr. Lemberg, she fails to indicate substantial evidence in the
4 record to support this nonspecific finding.

5 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
6 U.S.C. § 405(g) to the Acting Commissioner for further consideration of the medical
7 evidence provided by examining doctors, Dr. Hill and Dr. Lemberg.

BACKGROUND

Plaintiff, DANIEL E. LOVELL, was born in 1961 and was 48 years old on the
alleged date of disability onset of March 1, 2010 (*see* Tr. 170-72). Plaintiff has a
Bachelors of Science degree in Business Administration (Tr. 42). Plaintiff has work
experience as a sales representative, intake coordinator in social services and as a route
sales delivery truck driver (Tr. 94, 181, 192). Plaintiff was in a vehicle accident while
working as a route sales truck driver and has not worked since that time (Tr. 46-48).

According to the ALJ, plaintiff has at least the severe impairments of “learning disorder, cognitive disorder, adjustment disorder with depression, bipolar disorder by history, cervical sprain, shoulder arthritis status post surgeries, and cervicogenic headaches (20 CFR 404.1520(c))” (Tr. 14).

At the time of the hearing, plaintiff was living with his sister in a home they jointly own (Tr. 40-41).

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PROCEDURAL HISTORY

Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following reconsideration (*see* Tr. 170-71, 111-13, 119-123). Plaintiff's requested hearing was held before Administrative Law Judge Rebekah Ross ("the ALJ") on April 23, 2012 (*see* Tr. 31-100). On May 21, 2012, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr. 9-30).

On June 27, 2013, the Appeals Council denied plaintiff's request for review, making the written decision by the ALJ the final agency decision subject to judicial review (Tr. 1-5). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the ALJ's written decision in August, 2013 (*see* ECF Nos. 1, 3). Defendant filed the sealed administrative record regarding this matter ("Tr.") on December 24, 2013 (*see* ECF Nos. 10, 11).

In his Opening Brief, plaintiff raises the following issues: (1) Whether or not the ALJ erred in her evaluation of the medical evidence; and (2) Whether or not the ALJ erred in finding plaintiff not fully credible (*see* ECF No. 13, p. 1).

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d

1 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
2 1999)).

3 DISCUSSION

4 (1) **Whether or not the ALJ erred in her evaluation of the medical
5 evidence.**

6 Plaintiff contends that the ALJ erred when rejecting the opinions of examining
7 psychologists and physician, Dr. McCoy Dean Haddock, Psy.D, Dr. Edwin Hill, Ph.D.,
8 and Dr. Mary Lemberg, M.D.; and erred by relying on the opinions of non-examining
9 psychological and medical consultants (*see* Opening Brief, ECF No. 13, pp. 4-13).

10 The ALJ must provide “clear and convincing” reasons for rejecting the
11 uncontradicted opinion of either a treating or examining physician or psychologist.

12 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (*citing Embrey v. Bowen*, 849 F.2d
13 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). Even if a
14 treating or examining physician’s opinion is contradicted, that opinion can be rejected
15 only “for specific and legitimate reasons that are supported by substantial evidence in the
16 record.” *Lester, supra*, 81 F.3d at 830-31 (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043
17 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
18 accomplish this by “setting out a detailed and thorough summary of the facts and
19 conflicting clinical evidence, stating his interpretation thereof, and making findings.”

20 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (*citing Magallanes v. Bowen*, 881
21 F.2d 747, 751 (9th Cir. 1989)).

An examining physician's opinion is "entitled to greater weight than the opinion of a nonexamining physician." *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also* 20 C.F.R. § 404.1527(d). A non-examining physician's or psychologist's opinion may not constitute substantial evidence by itself sufficient to justify the rejection of an opinion by an examining physician or psychologist. *Lester, supra*, 81 F.3d at 831 (citations omitted). However, "it may constitute substantial evidence when it is consistent with other independent evidence in the record." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (*citing Magallanes, supra*, 881 F.2d at 752). "In order to discount the opinion of an examining physician in favor of the opinion of a nonexamining medical advisor, the ALJ must set forth specific, *legitimate* reasons that are supported by substantial evidence in the record." *Van Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996) (*citing Lester, supra*, 81 F.3d at 831).

For the reasons stated below, the Court finds that the ALJ properly discounted the opinion of Dr. Haddock, but failed to provide specific and legitimate reasons for discounting the opinions of Drs. Hill and Lemberg.

(a) **The ALJ gave legally sufficient reasons for the weight afforded to the medical opinion of Dr. Haddock.**

Dr. Haddock, Psy.D., examined plaintiff and opined in July of 2003 that plaintiff "is unable to carry a regular work load," further stating that plaintiff "requires a case load of 75% of normal" and "he is capable of doing his assignments, but requires more time to accomplish the task" (Tr. 534). Dr. Comrie, Psy.D., reviewed plaintiff's medical records in January of 2011 and contradicted this opinion, stating that plaintiff is able to carry out

1 simple routine tasks and some detailed instructions with reasonable concentration,
2 persistence and pace (*see* Tr. 22 (*citing* Tr. 440)). After reviewing plaintiff's medical
3 records, a state medical consultant affirmed Dr. Comrie's assessment (*see* Tr. 22 (*citing*
4 Tr. 449)). The ALJ rejected Dr. Haddock's opinion in favor of Dr. Comrie's opinion
5 because Dr. Haddock lacked a treatment history with the plaintiff, failed to define
6 "normal" in his determination that plaintiff could only carry seventy-five percent of a
7 normal caseload, and issued his opinion before plaintiff began working as a customer
8 service manager (Tr. 22).

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10 The lack of a treatment relationship between an examining psychologist and the
11 plaintiff could be a legitimate reason for rejecting that source's opinion in favor of a
12 treating source because more weight is given to a treating medical source's opinion than
13 to the opinions of those who do not treat the claimant. *Lester, supra*, 81 F.3d at 830
14 (*citing* *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). Here, however, the ALJ is
15 not rejecting the opinion of an examining source for the opinion of a treating source;
16 instead, she is rejecting it for the opinion of a non-examining source that lacks any form
17 of contact at all with plaintiff. The Court must reject this reason for discounting Dr.
18 Haddock's opinion because a lack of treatment history with the plaintiff cannot be a
19 legitimate reason for deferring to another source who likewise lacks a treatment history.

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21 The ALJ's second reason for discounting Dr. Haddock's opinion is equally
22 unconvincing. Although the ALJ found that Dr. Haddock used the term "normal"
23 ambiguously, the Court notes that Dr. Haddock's medical source statement was
24 sufficiently specific to allow for an evaluation and understanding of his opinion (*see* Tr.

1 534). References to plaintiff's "slowness at work" and inability "to carry a regular work
2 load" indicate that the language in question refers to plaintiff's inability to complete more
3 than 75% of the caseload normally demanded by his position. Therefore, this finding by
4 the ALJ does not provide a legitimate reason to discount Dr. Haddock's opinion. *See*
5 *Moseley v. Astrue*, No. 11cv5323-BHS-JRC, 2012 U.S. Dist. LEXIS 99899, at *25 (W.D.
6 Wash. June 21, 2012) (unpublished opinion) (Rejecting the ALJ's finding that "[t]he
7 medical source statement... provided is fairly vague" as a legitimate reason to discount
8 an examining physician's opinion when the "medical source statement was specific
9 sufficiently to allow for an evaluation and understanding" of the doctor's opinions.)
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11 Plaintiff's full-time position as a customer service manager subsequent to the issue
12 of Dr. Haddock's opinion is a sufficiently specific and legitimate reason to discount that
13 opinion. Although plaintiff suggests that success at this position was due to an
14 accommodation allowing plaintiff to work an additional six hours each day, the record
15 does not corroborate this claim. Indeed, the record indicates that he worked fourteen
16 hours a day, five to six days a week (*see* Tr. 203). It does not, however, indicate that an
17 accommodation was made allowing plaintiff to work more than forty hours each week
18 because he was a slow worker. In fact, in the examination of plaintiff by the ALJ it was
19 stated:
20

21 Q ...before that accident, were they happy with your work?
22 A Yes... when I first moved over from Spokane, I had a supervisor
23 named Eric Freeman, and I transferred over in August. I took over the
route that I had in October. And by the end of the year, he—or even—
I'll just say yeah, by the end of 2009... he said that I was doubling the
sales of the territory, which he was really happy about.

1 (Tr. 49).

2 The record suggests that plaintiff worked a longer than usual day in order to obtain
3 superior work results; namely, doubling the sales that his route would normally yield.
4 This contradicts Dr. Haddock's opinion that plaintiff could only accomplish 75% percent
5 of a normal workload while supporting Dr. Comrie's contradictory opinion that plaintiff
6 could sustain full-time work with reasonable concentration, persistence, and pace. A
7 reasonable mind could find this reason adequate to support the ALJ's decision to discount
8 Dr. Haddock's opinion in favor of Dr. Comrie. *See Magallanes, supra*, 881 F.2d at 747,
9 750.

10 Although the first two reasons offered by the ALJ for discounting Dr. Haddock's
11 opinion are not legitimate, plaintiff's subsequent performance as a customer service
12 manager constitutes a specific and legitimate reason supported by substantial evidence.

13 (b) **The ALJ gave insufficient reasons for the weight afforded to the**
14 **medical opinion of Dr. Hill.**

15 Dr. Hill, Ph.D., examined plaintiff in April of 2010 and concluded that plaintiff
16 suffered from bipolar disorder, cognitive disorder, and learning disorder (*see* Tr. 22
17 (*citing* Tr. 278)). He also stated that plaintiff "needed to be where he could work at his
18 own pace on one thing at a time" (Tr. 22 (*citing* Tr. 279, 280)). This opinion was
19 contradicted by the opinion of non-examining psychological consultant, Dr. Comrie,
20 Psy.D. (*see* Tr. 22 (*citing* Tr. 440)). The ALJ rejected the opinion from Dr. Hill in favor
21 of the opinion by Dr. Comrie (*see* Tr. 22).

When an ALJ seeks to discredit a medical opinion, he must explain why his own interpretations, rather than those of the doctors, are correct. *Reddick, supra*, 157 F.3d at 725 (*citing Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)); *see also Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989) (“When mental illness is the basis of a disability claim, clinical and laboratory data may consist of the diagnosis and observations of professionals trained in the field of psychopathology. The report of a psychiatrist should not be rejected simply because of the relative imprecision of the psychiatric methodology”) (*quoting Poulin v. Bowen*, 817 F.2d 865, 873-74 (D.C. Cir. 1987) (*quoting Lebus v. Harris*, 526 F.Supp. 56, 60 (N.D. Cal. 1981))).

The ALJ rejected Dr. Hill’s opinion because Dr. Hill noted that plaintiff exhibited poor effort on the tests, making the test results difficult to interpret and indicating that the plaintiff may have intentionally feigned cognitive dysfunction. Poor effort during an evaluation may speak to plaintiff’s credibility. *See Smolen, supra*, 80 F.3d at 1284 (citations omitted). But that does not mean it will undermine the qualifications or credibility of the medical professional who interprets those results. In his opinion, Dr. Hill acknowledged the limitations of the data obtained from the tests and made professional conclusions that took those limitations into account. He states in the conclusion of his report:

It does not appear that [plaintiff] put forth his maximum effort at all times and there are some indications that he was intentionally performing poorly on at least one of the tests. As such, it is difficult to interpret the obtained test results and they probably reflect a low estimate of his maximum capabilities. It seems likely that the obtained results are a function of psychiatric problems associated with mood disorder and current environmental stressors... He... appears to be in need of working

in an environment where he can work at his own pace in a supportive setting where he can focus on one thing at a time and have minimal demands for multitasking and/or distractions...

His performances were indicative of variable effort and limited ability to sustain productive activity consistently. *If such performances are indicative of how he would function on a day-to-day basis in the competitive marketplace, his prognosis for success would be guarded.*

(Tr. 279, 280) (emphasis added).

While the ALJ relies on the test results obtained by Dr. Hill to support her

assessment of plaintiff's credibility (*see* Tr. 19), she disregards Dr. Hill's interpretation of

those results while considering opinion evidence to evaluate plaintiff's level of function

(see Tr. 22). Although common sense might suggest that variable effort by an examinee

and inconsistent test results could undermine the accuracy of a medical opinion based on

those tests, it is not appropriate for the ALJ to insert her interpretation of the results in

place of an examining psychologist's opinion. See *Reddick*, *supra*, 157 F.3d at 725.

(citations omitted). See also *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990).

“judges, including administrative law judges of the Social Security Administration, must

be careful not to succumb to the temptation to play doctor. The medical expertise of the

Social Security Administration is reflected in regulations; it is not the birthright of the

¹lawyers who apply them. Common sense can mislead; lay intuitions about medical

phenomena are often wrong") (internal citations omitted); *Hanwick v. Astrue*, No. C12-

⁴⁸⁰ BALBAT, 2012 U.S. Dist. LEXIS 168008, at *6 (W.D. Wash. Nov. 7, 2012) (“A

All figures are scaled by 10^{-12} cm 2 s $^{-1}$ Hz $^{-1}$ rad $^{-1}$ sterad $^{-1}$ sr $^{-1}$.

⁶ See also *Surveillance Capitalism* (Cambridge, 2018). This concept will be explained.

1 the medical professional cites the variable effort of the examinee and inconsistency of the
2 test results to support his ultimate conclusion regarding the examinee's limitations.

3 Other than restating the specific results of the individual tests that Dr. Hill
4 performed and interpreted as a whole, the ALJ did not provide any reason for discounting
5 Dr. Hill's overall evaluation of those results. As such, the ALJ failed to provide a
6 legitimate reason for discounting the opinion of Dr. Hill.

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8 (c) **The ALJ gave insufficient reasons for the weight afforded to the
 medical opinion of Dr. Lemberg.**

9 On December 9, 2010, Dr. Lemberg, M.D., interviewed plaintiff and performed a
10 mental status evaluation where she determined that plaintiff would have difficulty
11 interacting with others, would require a highly structured work environment, and would
12 be unable to complete a normal work day without significant interruptions (*see* Tr. 22
13 (citing Tr. 241)). The ALJ rejected Dr. Lemberg's opinion "because it is not supported by
14 the longitudinal record" (Tr. 22-23).

15 Elsewhere in her opinion, the ALJ refers to the daily activities of the plaintiff, such
16 as walking his 30 pound puppy for 15-20 minutes a day, preparing meals and sweeping
17 floors (*see* Tr. 21, 65). She also references a lay opinion by Lisa Tang, PT, and Terry
18 Mertens, OTR/L, following a physical examination on December 15, 2011 that states
19 plaintiff performed at the light work category on a full time basis (Tr. 21 (*citing* Tr.
20 565)). While this evidence might support a finding that plaintiff physically is capable of
21 performing work on a full-time basis, it does not address the limitations outlined in Dr.
22 Lemberg's opinion that were based on plaintiff's mental status. Rather than indicate any
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1 evidence which might contradict Dr. Lemberg's opinion regarding plaintiff's mental
2 status, the ALJ indicates that "there was only one incident when the [plaintiff] had
3 difficulty with his supervisors" (*see* Tr. 23).

4 Apart from indicating an event that in fact supports the opinion that plaintiff
5 would have difficulties interacting with others, the ALJ also fails to reference any
6 evidence that contradicts Dr. Lemberg's opinion that plaintiff requires a highly structured
7 work environment and would be unable to complete a normal work day without
8 significant interruptions due to his mental status. Here, the ALJ merely stated that Dr.
9 Lemberg's opinion is not supported by the longitudinal record. Because this reason was
10 not specific nor supported by substantial evidence, the Court concludes that the ALJ
11 failed to provide a legally sufficient reason for discounting the opinion of Dr. Lemberg.

13 (d) **The errors by the ALJ in evaluating the medical evidence were
14 not harmless.**

15 The errors committed by the ALJ while evaluating Dr. Haddock's opinion were
16 harmless, but the errors committed in evaluating the opinions of Drs. Hill and Lemberg
17 were not.

18 The Ninth Circuit has "recognized that harmless error principles apply in the
19 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
20 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
21 Cir. 2006) (collecting cases)). The court noted that "in each case we look at the record as
22 a whole to determine [if] the error alters the outcome of the case." *Molina, supra*, 674
23 F.3d at 1115. Also, the Ninth Circuit has "adhered to the general principle that an ALJ's
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error is harmless where it is ‘inconsequential to the ultimate nondisability determination.’” *Id.* (quoting *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted). The Court will not reverse a decision by an ALJ in which the errors are harmless and do not affect the ultimate decision regarding disability. *See Molina, supra*, 674 F.3d at 1117-22; *see also* 28 U.S.C. § 2111; *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009).

The ALJ failed to properly credit the opinions of Dr. Hill and Dr. Lemberg regarding plaintiff's mental limitations in her residual functional capacity [RFC] analysis (*see* Tr. 22, 23). The ALJ's step four and step five findings were based on this RFC and, as the steps four and five findings may be different when based on an RFC that includes the limitations outlined by Dr. Hill and Lemberg, this matter must be evaluated anew.

(2) Whether or not the ALJ erred in finding plaintiff not fully credible.

The Court already has concluded that the ALJ erred in reviewing the medical evidence and that this matter should be reversed and remanded for further consideration, *see supra*, section 1. In addition, a determination of a claimant's credibility relies in part on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). Therefore, plaintiff's credibility should be assessed anew following remand of this matter.

CONCLUSION

The ALJ erred when reviewing the medical evidence provided by examining doctors, Dr. Hill and Dr. Lemberg.

Based on this reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

JUDGMENT should be for plaintiff and the case closed.

Dated this 9th day of July, 2014.

J. M. Ward (matins)

J. Richard Creature
United States Magistrate Judge